

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

IRINA L. FREW

Claimant

VS.

GTM SPORTSWEAR

Respondent

AND

CINCINNATI INSURANCE CO.

Insurance Carrier

Docket No. 1,051,802

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 2, 2011, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on February 7, 2012. The Director appointed Jeffrey King to serve as Appeals Board Member Pro Tem in place of recused Board Member Gary R. Terrill. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that although claimant's written claim was made 236 days after her accident, it was made before November 22, 2010, when claimant was found to be at maximum medical improvement and she stopped receiving workers compensation benefits and, therefore, was timely based on the language of K.S.A. 44-520a. The ALJ further found that claimant had a permanent partial impairment of function of 10 percent to the left upper extremity based on the rating opinions of Dr. Bryce Palmgren and Dr. Pedro Murati. The ALJ also held that there was no overpayment of temporary total disability benefits and, therefore, respondent is not eligible for a credit against the award of permanent partial disability. The ALJ ordered that future medical would be considered under proper application.

The Board has considered the record and adopted the stipulations listed in the Award. Also, during oral argument to the Board, counsel for respondent agreed that

claimant was temporarily and totally disabled for the 12-day period from the date of her June 18, 2010, surgery through June 29, 2010, when she was released to return to work with restrictions by Dr. Palmgren.

ISSUES

Respondent requests review of the ALJ's finding that claimant's written claim was timely. Further, respondent argues the rating opinion of Dr. Palmgren is more credible than that of Dr. Murati and that claimant has a 0 percent impairment of function to her left upper extremity. Respondent further argues that claimant was not entitled to temporary total disability benefits because she was not completely incapable of engaging in substantial and gainful employment on account of her injury. Accordingly, respondent asks the Board to find it is entitled to a credit for all temporary total disability benefits paid in this claim. Last, respondent asks that claimant be denied future medical because she failed to provide any evidence indicating a need for future medical.

Claimant asks the Board to find that claimant suffered a permanent injury to her left wrist and affirm the ALJ's award of 10 percent permanent impairment of function to her left upper extremity, which is an average of the ratings of Drs. Murati and Palmgren. Claimant further contends she is entitled to 39 weeks of temporary total disability benefits, her written claim was timely, and she is entitled to an award of future medical treatment upon proper application and approval of the Director.

The issues for the Board's review are:

- (1) Did claimant make timely written claim?
- (2) What is the nature and extent of claimant's disability?
- (3) Was there an overpayment of temporary total disability compensation? If so, should respondent be given a credit against the award of permanent partial disability compensation, if any, for the amount of temporary total disability benefits paid in this case?
- (4) Is claimant entitled to future medical upon proper application?

FINDINGS OF FACT

Claimant was employed by respondent as a machine operator. On November 4, 2009, she was pushing down on a hoop when something popped in her left wrist and she felt immediate pain. Claimant reported her injury to respondent and was sent to K+STAT, where she was seen by Dr. Douglas Hinkin. X-rays were taken but no fracture, dislocation, arthritic change or other abnormality was identified. Claimant was diagnosed with a sprain

of her left wrist and was given restrictions of no lifting, pushing or pulling greater than 15 pounds and no repetitive wrist movement on the left. She was seen a second time at K+STAT for follow-up, after which she was referred to Dr. Bryce Palmgren.

Dr. Palmgren, a board certified orthopedic surgeon, initially saw claimant on December 3, 2009. Claimant reported she injured her left wrist at work when hooping remnants. She told Dr. Palmgren her left wrist popped and she felt pain over the ulnar side of her wrist. The ulnar nerve typically gives sensation to the ring finger and small finger. Because claimant's pain was over the ulnar aspect of the wrist at the Triangular Fibrocartilage Complex (TFCC) area, Dr. Palmgren was concerned she had a possible TFCC tear. He restricted her to no lifting, pushing or pulling greater than 15 pounds, no repetitive wrist movement, and indicated she should wear a brace as needed, but he did not take her off work.

Dr. Palmgren ordered an MR arthrogram, which revealed claimant had a positive TFCC tear. Initially, Dr. Palmgren treated claimant conservatively with anti-inflammatories, braces, and physical therapy, but claimant did not respond and continued to have pain. Over the course of his treatment, he ordered an EMG, which was normal for conduction of the median nerve. On June 18, 2010, Dr. Palmgren performed surgery: a wrist scope, TFCC debridement, and ulnar nerve decompression at Guyon canal. After surgery, claimant was put back into a splint and returned to physical therapy. She was seen by Dr. Palmgren on follow-up on June 29, 2010, at which time he gave her a note indicating she could return to work as long as she did not use her left hand or arm and wore a splint at all times.

Dr. Palmgren testified that on August 3, 2010, claimant called and complained of elbow pain which had started "this Saturday."¹ Dr. Palmgren saw claimant on August 24. At that time, she said she woke up with elbow pain in late July but denied any injury or activity that would have started the pain. Dr. Palmgren could not attribute the pain in claimant's elbow to her surgery.

Dr. Palmgren's physical examination of claimant on November 22, 2010, showed she had good range of motion, no pain with testing of the TFCC, and her sensation was intact. He did not do specific grip testing with a Jamar dynamometer, but he looked at claimant's strength and grip and believed she did not have any muscle motor deficits. Claimant's only complaint was occasional tingling over her little finger and ring finger. Dr. Palmgren released her from treatment as being at maximum medical improvement. He provided claimant with a restriction of 25 pounds lifting, pushing and pulling. Based upon

¹ The Saturday before August 3 was July 31, 2010.

Dr. Palmgren's physical findings as of November 22, 2010, and the *AMA Guides*,² he found claimant had a 0 percent permanent partial impairment.

Dr. Palmgren saw claimant a total of ten times from December 3, 2009, through November 22, 2010. During the course of that treatment, the majority of claimant's symptoms were over the ulnar aspect of the left hand and the small and ring fingers. He does not recall any specific complaints of pain in the median nerve distribution of her hand or of pain to her thumb.

Dr. Pedro Murati is board certified in rehabilitation and physical medicine, pain management and independent medical examinations. At the request of claimant's attorney, he examined claimant on February 18, 2011. Claimant gave Dr. Murati a history of her injury, and he reviewed the medical records of her treatment. Claimant's complaints as of February 18, 2011, were pain in her left wrist and numbness in her left fourth and fifth digits.

In his physical examination, Dr. Murati found that claimant had lost sensation in her first and fifth digits. He also noted she had weakness in her left wrist due to pain and was weak in the abductor pollicis brevis on the left. She had no instability of the left wrist and no crepitus. Her left wrist was not tender to palpation. He performed carpal compression testing on the left, which was positive. Dr. Murati indicated that his physical examination showed claimant had loss of sensation in her left thumb and, further, she had a weak muscle that is innervated by the median nerve, which he diagnosed as carpal tunnel syndrome. Dr. Murati also diagnosed claimant with status post left wrist arthroscopy with TFCC debridement and left wrist Guyon's canal ulnar nerve decompression. Dr. Murati acknowledged he was probably the only physician who had diagnosed claimant with carpal tunnel syndrome. He also acknowledged that in reviewing Dr. Palmgren's notes, he did not find any mention that claimant had complained of a problem concerning her left thumb.

Using Table 16 of the *AMA Guides*, Dr. Murati rated claimant as having a 10 percent permanent partial impairment of the left upper extremity at the level of the wrist for mild carpal tunnel syndrome and 10 percent impairment of the left upper extremity at the level of the wrist for the Guyon's canal compression. The ratings combine to give claimant a 19 percent permanent partial impairment to the left upper extremity.

Claimant continued to work at respondent through February 19, 2010, and respondent was able to accommodate claimant's restrictions. Claimant had been living in Manhattan, but sometime in late January or early February 2010, she broke up with her boyfriend and moved to Junction City. Claimant does not own a car, and after claimant's move to Junction City, her daughter drove her to work. However, sometime over the

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

weekend of February 20 to 21, claimant's daughter's car was involved in an accident and was damaged such that it could no longer be driven without repair. Claimant called respondent on February 22, 2010, and asked for leave that day, stating she would be in the next day. On February 23, 2010, claimant went to work and spoke with her supervisor, Angelique. Claimant indicated to Angelique that it would take up to two weeks to repair her daughter's car and asked for leave from work for that period of time. Claimant testified that Angelique told her she could not be off that long and that her options were to quit or be fired. Angelique further told claimant that if she was fired, she would lose her workers compensation benefits. At this time, claimant was still being treated by Dr. Palmgren, so she quit. She signed a Separation Notice indicating she was leaving because she had no transportation and was unable to make it to work. The Separation Notice indicates that claimant is eligible for rehire.

Clark Ingram, respondent's vice president of human resources, testified that it would not be consistent with respondent's policy for a supervisor to tell an employee he or she would lose their workers compensation benefits if fired. He testified that claimant was available for rehire and respondent would be able to accommodate claimant's restrictions. Mr. Ingram was told that at one point, claimant had a restriction to avoid working with her left hand, and he indicated respondent would be able to accommodate an employee who is only able to work with one hand or arm and, in fact, has such an employee. He said none of the jobs at respondent are strenuous or require a lot of physical lifting. He also stated that respondent had hired 200 people over the last 90 days and if claimant wanted to return to work, she could contact respondent about getting a job.

Claimant testified that on February 10, 2011, she started working at a nail salon as a nail technician. She admitted that sometimes her wrist causes her a problem at that job.

As of the regular hearing, claimant said the little finger and ring finger on her left hand go numb. If she falls asleep on her left side, her whole arm will go numb. She said when she saw Dr. Murati in February 2011, she had numbness in her fingers but did not have numbness in her whole arm. Claimant said she does not have the strength in her left wrist and cannot bend her wrist as far as she used to. She has grip strength loss. Sometimes when she uses her fingers at work, she starts dropping things. Claimant said her left elbow still bothers her.

Respondent contends that claimant failed to timely file a written claim for compensation as it was not filed within 200 days of the date of the accident. Respondent received claimant's demand letter on June 29, 2010, which was 236 days after the date of accident of November 4, 2009.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-557(c) states:

No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

³ K.S.A. 2010 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

K.S.A. 44-510c(b) states in part:

(1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510h and 44-510i and amendments thereto, unless the temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for the first week of such disability. . . .

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .
(12) For the loss of a forearm, 200 weeks.

. . . .
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.A.R. 51-7-8(c)(4) states: "An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule."

ANALYSIS

The parties agree that claimant gave timely notice of her accident to respondent.⁵ Thereafter, claimant served written claim upon respondent by certified letter on September 15, 2010. At that time, claimant was receiving compensation in the form of medical benefits. Claimant continued to receive authorized medical treatment benefits, which respondent paid at least through November 22, 2010. Claimant was relieved of filing a claim during the time she received compensation and medical treatment.⁶ Written claim was served upon respondent within 200 days of the last payment of compensation and was, therefore, timely.

Dr. Murati followed Table 16 of the *AMA Guides* to determine that claimant's permanent impairment of function was 10 percent for mild entrapment neuropathy of the ulnar nerve and 10 percent for mild entrapment neuropathy of the median nerve. The Board is not persuaded that claimant has median nerve entrapment or carpal tunnel syndrome as a result of her work injury with respondent. The Board is also not persuaded that Dr. Palmgren's examination was consistent with the *Guides* or revealed an accurate reading of claimant's resulting impairment. But the diagnosis of ulnar nerve entrapment is uncontroverted. Dr. Palmgren performed ulnar nerve decompression surgery at the Guyon canal in addition to the surgery he performed at the TFCC area of claimant's left wrist. Both Dr. Murati and Dr. Palmgren described claimant's left wrist symptoms as mild. Dr. Palmgren believed claimant was in need of permanent work restrictions. Pursuant to Table 16 of the *AMA Guides*, claimant is entitled to a permanent impairment rating of 10 percent to her left upper extremity. Pursuant to K.S.A. 44-510d(a)(12), this 10 percent impairment is a scheduled injury at the level of the forearm.

Claimant was working for respondent in an accommodated job that was within her temporary restrictions until February 22, 2010, when she missed work due to transportation problems. As a result of the transportation issue, claimant resigned her employment with respondent. At that time, claimant was working under temporary restrictions given by Dr. Palmgren of no lifting, pushing or pulling greater than 15 pounds, no repetitive wrist movement and to wear a wrist brace. Claimant neither stopped working due to her injury, nor was she totally disabled from engaging in gainful employment on account of her injury. Accordingly, except for the period of time claimant was taken off work following her surgery, claimant is not entitled to temporary total disability compensation. Respondent is entitled to an offset for the overpayment of temporary total disability against the award of permanent partial disability compensation.

⁵ K.S.A. 44-520.

⁶ See *Odell v. Unified School District*, 206 Kan. 752, 757, 481 P.2d 974 (1971).

Claimant is entitled to seek future medical treatment upon proper application to and approval of the Director. K.S.A. 2010 Supp. 44-510k gives claimant this right to seek additional medical treatment without regard to whether such future treatment was contemplated at the time of the original award.

CONCLUSION

- (1) Claimant made timely written claim for compensation.
- (2) As a result of her accident, claimant has a 10 percent permanent impairment of function to her left upper extremity at the level of the forearm.
- (3) Claimant is entitled to temporary total disability compensation for the period commencing one week after her June 18, 2010, surgery until released to substantial, gainful employment on June 29, 2010, a period of 5 days. Respondent is entitled to an offset of the overpayment of temporary total disability compensation against the award of permanent partial disability compensation.
- (4) Claimant is entitled to seek future medical treatment upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated November 2, 2011, is modified to find that claimant is limited to .71 weeks of temporary total disability compensation but is otherwise affirmed.

Claimant is entitled to .71 weeks of temporary total disability compensation at the rate of \$231.08 per week in the amount of \$164.07 followed by 19.93 weeks of permanent partial disability compensation, at the rate of \$231.08 per week, in the amount of \$4,605.42 for a 10 percent loss of use of the forearm, making a total award of \$4,769.49. Respondent is entitled to an offset for the 38.29 weeks of compensation it paid at the rate of \$230.66 per week or \$8,831.97. Because of the offset for the overpayment to temporary total disability compensation, the disability compensation award has been paid in full.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge